

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter of	)	
	)	
Service Rules for the 698-746, 747-762 and 777-792 MHz Bands	)	WT Docket No. 06-150
	)	
Revision of the Commission's Rules to Ensure Compatibility With Enhanced 911 Emergency Calling Systems	)	CC Docket No. 94-102
	)	
Section 68.4(a) of the Commission's Rules Governing Hearing-Aid Compatible Telephones	)	WT Docket No. 01-309
	)	
Biennial Regulatory Review – Amendment of Parts 1, 22, 24, 27, and 90 to Streamline and Harmonize Various Rules Affecting Wireless Radio Services	)	WT Docket No. 03-264
	)	
Former Nextel Communications, Inc. Upper 700 MHz Guard Band Licenses and Revisions to Part 27 of the Commission's Rules	)	WT Docket No. 06-169
	)	
Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band	)	PS Docket No. 06-229
	)	
Development of Operational, Technical and Spectrum Requirements for Meeting federal, State and Local Public Safety Requirements Through the year 2010	)	WT Docket No. 96-86

***EX PARTE* REPLY COMMENTS OF PTPMS II COMMUNICATIONS, LLC**

PTPMS II Communications, LLC (“PTPMS II”) offers the following *ex parte* Reply Comments in connection with the Further Notice of Proposed Rulemaking (“Further Notice”) issued in the above-captioned proceedings, and requests that they be made a part of the record in these proceedings. PTPMS II strongly opposes any action by the Commission in this proceeding that would result in the involuntary diminishment or alteration of its spectrum licenses, and submits that such action is contrary to the public interest. PTPMS II specifically urges the Commission to reject the involuntary “grandfathering” proposals proffered by Access Spectrum and Pegasus Communications, which will risk further uncertainty and administrative litigation with respect to the 700 MHz band plan.<sup>1</sup>

PTPMS II is a 700 MHz Guard Band licensee in good standing with the Commission. PTPMS II paid a net winning bid of \$ 6,279,000 million dollars in the 700 MHz Guard Band auction, and presently holds the A-Block Guard Band license to serve Buffalo, New York, and two B-Block licenses to serve El Paso, Texas-Albuquerque, New Mexico and Des Moines, Iowa, respectively.

Like every other Guard Band Licensee – including Access Spectrum and Pegasus – PTPMS II to date has been unsuccessful in developing its licenses for operation due to what have proven to be unworkable regulatory constraints.

PTPMS II has been supportive in concept of proposals that would provide relief

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<sup>1</sup> Reply Comments of Access Spectrum, LLC, Dominion 700, Inc., Harbor Guardband, LLC, and Pegasus Communications Corporation (June 4, 2007) (“Access Spectrum/Pegasus Reply Comments”).

from these restrictions and help optimize the Guard Band spectrum for commercial service. PTPMS II also has been in a dialogue with Access Spectrum and Pegasus, who have proposed a 700 MHz band plan and “re-packing” plan that they assert will serve the interests of both Guard Band and public safety licensees.

PTPMS II reiterates its willingness to work with other licensees and the Commission to find an acceptable public interest outcome that will balance the needs and goals of affected parties in this proceeding. But PTPMS II opposes the singling out of PTPMS II in this proceeding for an inequitable, involuntary and likely illegal alteration and substantial reduction in spectrum and usage rights.

The Commission should not treat Guard Band licensees disparately and in piecemeal fashion. As a matter of process, the specific and targeted modification of PTPMS II’s licenses proposed by Access Spectrum and Pegasus is not a rule of general applicability that will affect all Guard Band licenses equally, and it therefore cannot be accomplished in a general rulemaking proceeding. There is no question that such action applied to PTPMS II would be “individual action masquerading as a general rule,” with “substance and effect [that] is individual in impact and condemnatory in purpose.”<sup>2</sup>

On the merits, moreover, there are additional serious legal and policy considerations the Commission would need to consider in connection with such an involuntary modification. The record is not clear that there are demonstrable

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<sup>2</sup> *American Airlines Inc. v. Civil Aeronautics Board*, 359 F.2d 624, 631 (D.C. Cir.), *cert. denied*, 385 U.S. 843 (1966). *See also* 47 U.S.C. § 316 (requiring a public interest finding to justify license modification and according individualized procedural protections to licensees subject to Commission modification orders).

public interest benefits that would flow from such a draconian modification.<sup>3</sup>

Furthermore, modifying PTPMS II's license would constitute a stark departure from the Commission's typical methods of dealing with incumbent licensees, which have emphasized relocation and compensation for licensees whose spectrum or operations are negatively impacted by band plan modifications.<sup>4</sup>

Furthermore, the purported benefits of the Access Spectrum and Pegasus plan must be weighed against the ill-advised precedent the Commission would set in disrupting the settled expectations of licensees who have participated successfully in spectrum auctions. Auction winners who have paid significant monies for their spectrum rights have a justifiable trust, reliance and expectation that they have purchased the opportunity to develop their licenses during their license terms, subject to applicable buildout and performance requirements. In this case, PTPMS II has until January 1, 2015 to develop its licenses. It should be permitted to do so using *all* of its licensed spectrum.

It may still be possible for PTPMS II to sign on to the Access Spectrum and Pegasus plan if there is a fair mechanism for PTPMS II to be compensated for the proposed loss of half of its 700 MHz Guard Band spectrum, which sold for more

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<sup>3</sup> For example, a public interest cornerstone of the Access Spectrum/Pegasus proposal is the promotion of nationwide 700 MHz interoperability for public safety – yet, there is not unanimity on the desirability of such interoperability on the part of public safety constituents. *See, e.g.*, Comments of the City of New York (May 23, 2007) at 2 (noting that the “challenges the Further Notice presents commence with not recognizing that a one-size-fits-all concept is counter to effective public safety communications”).

<sup>4</sup> *See Further Notice*, ¶ 263, n. 536. *See also Teledesic LLC v. Federal Communications Commission*, 275 F.3d 75, 86 (D.C. Cir. 2001) (describing Commission's typical approach to the relocation of incumbent licensees).

than \$8.3 million on a gross basis at auction, and in which PTPMS II has already invested more than \$6.2 million. But if PTPMS II must be grandfathered, such action should not entail a radical, involuntary *ex post facto* modification of PTPMS II's licenses. Given the small number of licenses held by PTPMS II, the grandfathering of its future operations using all of its current spectrum will have a minimal affect on other commercial licensees or public safety operations at 700 MHz.

In Appendix B to the *Access Spectrum/Pegasus Reply Comments*, Access Spectrum and Pegasus discuss alternative ways to grandfather PTPMS II's licenses.<sup>5</sup> One of these proposals

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<sup>5</sup> Access Spectrum/Pegasus Reply Comments, Appendix B, "Modification of Certain Licenses Not Included in the Re-Packing Agreement."

appears to do so without effecting any modification of PTPMS II's licenses.<sup>6</sup> PTPMS II generally supports such an approach in the event grandfathering becomes necessary.<sup>7</sup>

PTPMS II urges in such an event that any remaining Guard Band restrictions be removed from its licenses so that it can optimize them for commercial use. Such operational restrictions have been a primary reason that Guard Band spectrum has lain fallow since its initial assignment via auction many years ago. It is in the public interest for the Commission to promote the development of service in this spectrum, consistent with its overall policy goals of encouraging commercial operations at 700 MHz.

Respectfully submitted,

/s/

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July 6, 2007

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<sup>6</sup> *Id.* at 5-6.

<sup>7</sup> Access Spectrum and Pegasus suggest as a feature of several of their proposals that a reversionary interest could be created in PTPMS II's licenses in the event they are not renewed. *See, e.g., id.* at 6. PTPMS II opposes the creation of such interests if and to the extent they would be inconsistent with PTPMS II's Commission-acknowledged renewal expectancy in the event it has deployed service to the public using its licenses.